

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of NOONAN W. GREENE and TENNESSEE VALLEY AUTHORITY,  
BROWNS FERRY, Chattanooga, TN

*Docket No. 99-468; Submitted on the Record;  
Issued October 13, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On June 30, 1989 appellant, then a 46-year-old iron welder, sustained an employment-related left ankle contusion and strain and a posterior left tibial tendon rupture. He received compensation for various periods of disability. By award of compensation dated July 31, 1992, appellant received a schedule award for a 10 percent permanent impairment of his left leg. Appellant was terminated from the employing establishment effective September 30, 1996 due to a reduction-in-force. He then claimed that he sustained a recurrence of disability on September 30, 1996 due to his June 30, 1989 employment injury.

By decision dated February 6, 1997, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after September 30, 1996 due to his June 30, 1989 employment injury. On January 30, 1998 appellant requested reconsideration of his claim and, by decision dated April 23, 1998, the Office denied his request for merit review.

The only decision before the Board on this appeal is the Office's April 23, 1998 decision, denying appellant's request for a review on the merits of its February 6, 1997 decision. Because more than one year has elapsed between the issuance of the Office's February 6, 1997 decision

and October 26, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the February 6, 1997 decision.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>5</sup>

In support of his January 30, 1998 reconsideration request, appellant submitted an April 2, 1997 report, in which Dr. John T. Murphy, an attending Board-certified orthopedic surgeon, indicated that appellant continued to have disability due to his medical problems including his employment-related left ankle condition. Dr. Murphy reported the findings of his examination of appellant on that date and stated:

"I discussed all these findings with [appellant]. Today we discussed the possibility of his return to work and I have told him that with his combination of problems, particularly with his left ankle, his left knee and his right shoulder, he would only be a candidate to return to a desk-type sedentary job. [Appellant] is not a candidate to return to standing, walking, climbing, stooping or squatting or any job which requires prolonged upright posture."

The April 2, 1997 report of Dr. Murphy contains an opinion that appellant sustained a recurrence of employment-related disability<sup>6</sup> and it constitutes relevant and pertinent evidence which had not been previously considered by the Office. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review and the Office abused its discretion when it refused to reopen appellant's claim for merit review in its April 23, 1998 decision.<sup>7</sup> The case shall be remanded to the Office and, after any development deemed necessary, the Office shall conduct a merit review of appellant's claim, pursuant to 5 U.S.C.

---

<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>6</sup> The welder position held by appellant at the time he was injured required duties which were prohibited by Dr. Murphy.

<sup>7</sup> See *supra* note 3 and accompanying text; *Kenneth R. Mroczkowski*, 40 ECAB 855, 858-59 (1989).

§ 8128(a) and issue an appropriate merit decision regarding whether appellant sustained a recurrence of disability on or after September 30, 1996 due to his June 30, 1989 employment injury.

The decision of the Office of Workers' Compensation Programs dated April 23, 1998 is reversed and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
October 13, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member